Agenda Date: 3/16/06
Agenda Item: 4B

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

DIVISION OF
TELECOMMUNICATIONS

IN THE MATTER OF THE PETITION OF UNITED TELEPHONE COMPANY OF NEW JERSEY, INC. FOR A RESOLUTION OF A DISPUTE WITH MCImetro ACCESS TRANSMISSION SERVICES

ORDER ON
RECONSIDERATION

DOCKET NO. TO02070394

SERVICE LIST ATTACHED

BY THE BOARD:

On December 28, 2005, MCImetro Access Transmission Services ("MCI") filed a motion for reconsideration as to an Order issued by the Board of Public Utilities ("Board"), under the above caption, dated December 5, 2005, which adopted in part and modified in part the Initial Decision of Administrative Law Judge W. Todd Miller as it dealt with an ongoing interconnection agreement dispute between MCI and United Telephone Company of New Jersey, Inc., d/b/a Sprint ("Sprint"). Specifically, and without waiver of any other claims which may be the subject of further review, MCI objects to the Board's modification of the ALJ's initial decision as to the effective date. As the Board noted in its original Order:

> The Board disagrees with that finding. Based upon the record presented, and the nature of the ALJ's findings on the change in law resulting from the FCC's ISP Remand Order, the Board HEREBY FINDS that the proper date for the modification of the Agreement is the date of MCI's filing for bankruptcy – July 21, 2002. MCI's decision to assume the Agreement through the bankruptcy proceeding brings the full agreement into play, including the change of law provision. E.g., 11 U.S.C. § 365; NLRB v. Bildisco & Bildisco, 465 U.S. 513, 531, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984). We find that the bankruptcy should not impact the relationship as the record does not reflect that either party took steps to mitigate during its pendency, and thus no bad faith on either party is apparent. Thus, once it has been found that the change of law occurred, the appropriate date is from the date of the bankruptcy, based upon the agreement between the parties that removed from consideration pre-bankruptcy compensation issues.

> The Board is not persuaded that this is an example of a retroactive ratemaking, as the entire purpose of the petition filed by Sprint was to determine the rate involved in the Agreement. The Board's determination here that the Agreement is controlled by the FCC's ISP Remand Order is not and can not qualify as a retroactive ratemaking action on the part of the Board.
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> [December 5, 2005 Order, at 5-6 (footnote omitted).]

MCI, in its motion, claims that the Board misunderstood the nature and impact of the bankruptcy settlement entered into between MCI and Sprint, and placed emphasis and significance where none was warranted. MCI notes that the bankruptcy was referenced only in a joint stipulation and was never introduced into evidence or otherwise considered in any substantive manner. Furthermore, the settlement of the bankruptcy claim occurred in October 2003, and thus, claims MCI, the date of entry into the settlement as of July 21, 2002 should be of no import.

Likewise, asserts MCI, the effective date of the change in law is the date upon which the Board approves the amendment to the interconnection agreement, and the Board is incorrect in placing any other date upon the process. MCI sets forth the language of the prior agreement and claims that the process is clear – the parties should negotiate in the event of a change of law and this agreement (or resolution in the event negotiations fail) should be implemented only upon Board approval. Also, the Board's actions here, according to MCI, functions as the equivalent of retroactive ratemaking, which the Board has never imposed. As such, MCI proposes a date based upon an "assumed" 20 month resolution period based upon the time pending as compared to the time spent in bankruptcy. This date, March 2004, asserts MCI, is a reasonable "compromise," assuming the Board is unwilling to accept that the date should be the date of a completed, Board-approved agreement. Thus, MCI calls upon the Board to modify its prior Order appropriately.

Sprint filed a reply, asserting that the Board's decision was correct and that reconsideration or modification is inappropriate. Sprint claims that the burden of demonstrating "the alleged errors of law or fact relied upon" rests upon MCI, and that a mere disagreement or assertion of error without more is insufficient to allow for the relief requested. Within this framework, Sprint claims that MCI has failed to provide a foundation for reconsideration or modification.

Sprint claims that the Board fully understood the significance and import of the bankruptcy settlement, and that the necessary details relied upon by the Board were included in the record. The Board's use of the date of settlement of the prior charges, without more, is simply an exercise of the Board's discretion, asserts Sprint, and is based upon the evidence of the settlement in the record. The Board's acceptance of this element of the record is appropriate and proper, according to Sprint, and MCI's claim to the contrary is without merit.

Likewise, Sprint claims that the remainder of MCI's motion is simply a "rehash" of prior arguments which the Board previously rejected. Sprint claims that MCI's refusal to accept any date other than that of an approved amended interconnection agreement, as well as MCI's various delays, is designed as a way for MCI to manipulate the system to its own benefit, and Sprint believes that the Board appropriately rejected this interpretation. As such, Sprint calls upon the Board to deny this motion and to reaffirm its Order as written.

Following review, and in light of the nature of the motion, the Board finds that nothing in MCI motion requires the Board to modify or otherwise reconsider its decision. A party should not

seek reconsideration merely based upon dissatisfied with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. At 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In much the same manner, this Board will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. Here, the Board does not find that the issues raised by MCI are sufficient to warrant reconsideration or modification. MCI's allegations of error are, essentially, reiterations of the arguments presented below, which the Board rejected. Nothing in the arguments presented now rises to the level to convince the Board that the selection of a date for modification of the compensation scheme based upon the bankruptcy settlement is fatally flawed or wrong. As such, the Board HEREBY FINDS that the errors alleged by MCI do not rise to the level to require reconsideration or other modification of the Board's December 5, 2005 Order, and thus the Board HEREBY ORDERS that the motion for reconsideration by MCI is DENIED.

DATED 3/22/06

BOARD OF PUBLIC UTILITIES
BY:

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PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

CONNIE O. HUGHES
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

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ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

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